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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION,)	
NORTHWEST COALITION FOR)	Civ. No. C01-0132C
ALTERNATIVES TO PESTICIDES,)	
PACIFIC COAST FEDERATION OF)	
FISHERMEN'S ASSOCIATIONS, and)	REPLY IN SUPPORT OF PLAINTIFFS'
INSTITUTE FOR FISHERIES RESOURCES,)	MOTION FOR FURTHER ACTION BY
)	DEFENDANT ENVIRONMENTAL
Plaintiffs,)	PROTECTION AGENCY TO IMPLEMENT
)	JANUARY 22, 2004 ORDER
v.)	
)	NOTE ON MOTION CALENDAR:
ENVIRONMENTAL PROTECTION)	FRIDAY, JULY 16, 2004
AGENCY, and MICHAEL O. LEAVITT,)	
ADMINISTRATOR,)	
)	
Defendants,)	
)	
AMERICAN CROP PROTECTION)	
ASSOCIATION, et al.,)	
)	
Intervenor-Defendants.)	

INTRODUCTION

Defendant Environmental Protection Agency ("EPA") opposes plaintiffs' Washington
Toxics Coalition's ("WTC's") motion for further actions to implement the January 22, 2004

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR
FURTHER ACTION BY DEFENDANT ENVIRONMENTAL
PROTECTION AGENCY TO IMPLEMENT JANUARY 22, 2004
ORDER (C01-0132C) - 1 -

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1 Order's point of sale notification requirements first by claiming that the Court has no authority to
2 issue such an order and second by asserting that such relief is impractical and unnecessary.

3 None of these objections has merit.

4 I. THE COURT HAS THE AUTHORITY TO ORDER EPA TO TAKE FURTHER
5 ACTIONS TO IMPLEMENT THE ORDER'S POINT OF SALE NOTIFICATION
6 REQUIREMENTS.

7 In arguing that this Court is powerless to order the requested additional relief, EPA
8 misunderstands the basis for the request. Contrary to EPA's assertion that WTC has failed to
9 allege a violation of the January 22, 2004 Order, WTC is claiming such a violation. Under the
10 Order (IV.B.), EPA "must notify retailers that they are to make the mandatory point of sale
11 notification . . . whenever products containing the Urban Pesticides are sold in the Urban Areas
12 subject to this Order." By doing no more than placing a notice in the Federal Register, EPA
13 failed to provide the requisite notice. While WTC chose not to couch the motion in terms of a
14 violation of the Order or a motion for contempt in order to avoid escalating the conflict, its
15 motion is unquestionably predicated on EPA's failure to provide an adequate notice to
16 accomplish the Order's direction and intent that EPA would, in fact, notify retailers of the
17 Order's point of sale notification requirements.

18 Understood in this light, the jurisdictional obstacles postulated by EPA dissipate. The
19 fact that the January 22, 2004 Order has been appealed does not divest this Court of jurisdiction
20 to ensure compliance with the Order or to issue further relief to ensure that the Order is
21 implemented as intended. The Federal Rules of Civil Procedure make this authority explicit in
22 Rule 62(c), which EPA never addresses. That Rule confirms that a district court retains the
23 power to "suspend, modify, restore, or grant an injunction during the pendency of the appeal
24 upon such terms as to bond or otherwise as it considers proper for the security of the rights of the

adverse party.” See also Acevedo-Garcia v. Vera-Monroiq, 368 F.3d 49 (1st Cir. 2004) (appeal did not deprive district court of contempt powers). Moreover, the cases cited by EPA recognize that a district court retains jurisdiction to preserve the status quo during the appeal and that an appeal does “not divest the court of jurisdiction to modify that order to achieve the same enforcement purpose” as the original order. McClatchy Newspapers v. Central Valley Typographical Union No. 46, 686 F.2d 731, 735 (9th Cir. 1982). A district court can make minor adjustments to an injunction “that effectuate the underlying purposes of the original requirements,” particularly where the original order provision was vague and did not accomplish its purpose. Natural Resources Defense Council v. Southwest Marine Inc., 242 F.3d 1163, 1167 (9th Cir. 2001).

Here the original Order directed EPA to notify retailers of the point of sale notification requirements. While the Order did not prescribe the particular notification method to be employed, it envisioned that EPA would use an effective means to accomplish such notification. EPA nonetheless chose to place a notice in the Federal Register even though it had no reason to believe that retail sales outlets would consult the Federal Register when developing their product displays. While EPA cites cases (at 10) stating that the Federal Register provides adequate notice of regulatory requirements for purposes of due process, it never addresses the cases cited by WTC (at 8-9) where district courts required more targeted notice to affected interests of the requirements of a court order.

At the June 29, 2004 status conference, this Court directed EPA to identify methods of communication that it has used in analogous situations. In response, WTC identified: (1) instances in which federal agencies, including EPA, have used notification methods more likely to reach specific audiences; and (2) materials that EPA has disseminated at points of sale. In a

1 footnote (at 7 n.4), EPA merely asserts, without any citation and without addressing WTC's
2 contrary examples, that the Federal Register and its website constitute its only mechanism for
3 communicating with retailers.

4 This Court retains authority to ensure compliance with, and implementation of, its orders
5 even when they are on appeal, as Fed. R. Civ. P. 62(c) confirms, and the Court can exercise this
6 authority without resort to Fed. R. Civ. P. 60(b). However, even if WTC had to seek such relief
7 pursuant to Rule 60(b), such a motion would fall within Rule 60(b)(2), which allows parties to
8 seek relief from an order based on newly discovered evidence. WTC could not have discovered
9 that EPA would do no more than publish a notice in the Federal Register until EPA took that
10 action and nothing more.

11 EPA's post-injunction actions that fall short of achieving the injunction's purpose are
12 properly the subject of a motion to modify the injunction in minor respects or to order further
13 relief. In crafting such relief, this Court has ample authority to require EPA to notify retailers
14 through means that are more likely to reach them than publication of a notice in the Federal
15 Register.

16 II. THE REQUESTED FURTHER RELIEF IS PRACTICAL AND NECESSARY TO
17 EFFECTUATE THE PURPOSE OF THE ORDER'S POINT OF SALE
NOTIFICATION REQUIREMENTS.

18 EPA contends that it would be impractical and expensive for it to provide notice to
19 retailers by mail due to the difficulty of identifying the universe of retail home and garden stores
20 in the urban areas subject to the Order. However, as EPA acknowledges, the defendant-
21 intervenors have already developed a list of retailers that sell home and garden products in the
22 urban areas subject to the Order. While EPA contends it is not privy to that mailing list, there is
23 every reason to assume that defendant-intervenors would share that list with EPA since it does

1 not contain confidential business information.

2 Moreover, an individualized notice to retailers would not, contrary to EPA's unsupported
3 assertion, be redundant since no one contends they have received sufficient information to
4 understand the requirements of and implement the Order's point of sale warnings. First, retailers
5 do not regularly read the Federal Register. Accordingly, a direct EPA notification to retailers
6 would do more than reiterate that notice. Second, as explained in WTC's motion, the CropLife
7 letter distributing the point of sale warning failed to provide the basic information necessary to
8 understand the terms of the Order's point of sale notification requirements.¹

9 WTC explained in its motion why further EPA actions to ensure implementation of the
10 Order's point of sale notification requirements are necessary. EPA has offered no evidence to
11 counter that need. For the reasons described above and those set out in WTC's motion, the Court
12 should order EPA to take the requested further actions to implement the January 22, 2004

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18 ¹ EPA never contends that the CropLife cover letter provides sufficient information to notify
19 retail establishments of the Order's point of sale notification requirements. Nor does it dispute
20 that the industry website to which EPA's Federal Register notice refers retailers for point of sale
21 notifications contains industry propaganda. To ensure that retailers can obtain an adequate
22 description of the Order's requirements, as well as updated information, EPA should be required
23 to publish another notice in the Federal Register that directs retailers to EPA's website, rather
24 than the industry website, for point of sale notifications.

1 Order's point of sale notification requirements.²

2 Respectfully submitted this 19th day of July, 2004.

3
4
5 /s/ Patti Goldman
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21 ² While the point of sale notification can now be obtained through EPA's website, the Court
22 should still direct that both the point of sale notification and a description of the Order's point of
23 sale notification requirements be posted on EPA's website. Such an explicit order is necessary
24 because EPA did not post this information on its website until June 25-29, 2004, immediately
prior to the June 29, 2004 status conference, and then it inexplicably withdrew the information
until shortly before filing its opposition to this motion for further relief.

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On July 19, 2004, I served a true and correct copy of:

1. Reply in Support of Plaintiffs' Motion for Further Action by Defendant Environmental Protection Agency to Implement January 22, 2004 Order

on the parties listed below:

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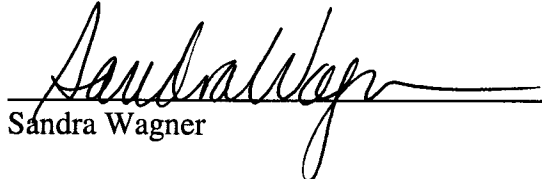
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10 I, Sandra Wagner, declare under penalty of perjury that the foregoing is true and correct.

11 Executed this 19th day of July, 2004, at Seattle, Washington.

12
13 
14 Sandra Wagner